Citibank NA v Ibrahim bin Othman

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–492–1992
MAHADEV SHANKAR J
30 DECEMBER 1993

Land Law *— Charge — Order for sale — Whether O 83 r 3 of the Rules of the High Court 1980 complied with — Failure to provide statutory particulars in affidavit-in-support of application — Whether omission curable — Rules of the High Court 1980 O 83 r 3*

Words and Phrases *— 'Foreclosure'*

The plaintiff, Citibank NA, applied for an order for sale of the defendant's land ('the land') in order to effect payment of moneys secured by the charge of the land. The defendant claimed that the plaintiff had failed to provide the statutory particulars required under O 83 r 3 of the Rules of the High Court 1980 ('the RHC') in the first affidavit in support of its application, namely, the amount of the advance and the rate at which interest had been calculated. The plaintiff however contended that O 83 r 3 only applied to a claim for delivery of possession and, as this was a foreclosure action, O 83 r 3 did not apply.

Held, dismissing the application:

(1) The plaintiff had applied for an order for sale in order to effect repayment of moneys secured by a charge and, on a reading of O 83 rr 1(1)(a), (b), (c), 3(3) and 3(6) together, it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit. The plaintiff had failed to do so and the subsequent affidavits filed before the final hearing also did nothing to remedy the earlier inadequacies as the affidavits did not correctly state the amount of the advance nor show at what rate interest had been calculated. Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission if no real prejudice would thereby result to the defendant. However in this case, the affidavits did not show how and from what date the plaintiff had become entitled to charge an interest of 14%pa. This was a material omission as the defendant expressly disputed the liability to pay interest at 14%pa.

(2) The objective of O 83 r 3 is to enable the defendant to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order 'the total amount due to the chargee at the date on which the order is made'. These words are from s 257(1)(c) of the National Land Code 1965 and they are mandatory.

(3) The term 'foreclosure' is used to mean the steps taken for the sale of mortgaged property by a court order or by a power of sale contained in the mortgage so that the sale proceeds can be used to pay off the debt.

[Bahasa Malaysia summary

Plaintif, Citibank NA, telah memohon untuk suatu perintah untuk menjual tanah defendan ('tanah itu') supaya mendapat pembayaran wang yang dijamin oleh gadaian atas tanah itu. Defendan mendakwa bahawa plaintif telah gagal memberikan butir-butir statutori yang diperlukan di bawah A 83 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu') di dalam afidavit pertama yang menyokong permohonannya, iaitu, jumlah wang pendahuluan itu dan kadar mengikut mana faedah telah dikira. Bagaimanapun, plaintif menegaskan bahawa A 83 k 3 hanya terpakai kepada suatu tuntutan untuk hantar-serah milikan dan oleh kerana tindakan ini merupakan suatu tindakan sekat-tebusan, A 83 k 3 tidak terpakai.

Diputuskan, menolak permohonan itu:

(1) Plaintif telah memohon untuk suatu perintah jualan supaya mendapat pembayaran balik wang yang dijamin oleh suatu gadaian dan, dengan membaca A 83 kk 1(1)(a), (b), (c), 3(3) dan 3(6) bersama, adalah menjadi kewajipan plaintif untuk menyediakan butir-butir statutori di dalam afidavit pertama. Plaintif telah gagal berbuat demikian dan afidavit selanjutnya yang difailkan sebelum pendengaran muktamad juga tidak membuat apa-apa untuk membetulkan kekurangan yang lebih awal itu kerana afidavit-afidavit tersebut tidak menyatakan dengan betul jumlah wang pendahuluan itu biarpun pada kadar apa faedah telah dikira. Kecuali jika keterangan mengenai jumlah betul yang kena dibayar telah dikemukakan sebelum pendengaran muktamad, mahkamah mempunyai kuasa untuk mengecualikan suatu peninggalan jika tidak ada kemudaratan benar akan diakibatkan kepada defendan. Akan tetapi dalam kes ini, afidavit-afidavit itu tidak menunjukkan bagaimana dan dari tarikh apa plaintif telah berhak mengenakan faedah pada kadar 14% setahun. Ini merupakan suatu peninggalan yang material kerana defendan secara nyata mempertikaikan liabilitinya untuk membayar faedah pada kadar 14% setahun.

(2) Objectif A 83 k 3 adalah untuk membolehkan defendan mengetahui sekurang-kurangnya pada tarikh saman permulaan itu difailkan, apakah jumlah sebenar yang beliau mempunyai liabiliti di sisi undang-undang untuk membayar, supaya beliau boleh membuat keputusan untuk mempertikai atau membayarnya. Jika terdapat suatu pertikaian mengenai jumlah yang perlu dibayar, mahkamah mesti dapat berkata dengan tepat apabila membuat perintahnya 'jumlah penuh yang terhutang kepada pemegang cagaran pada tarikh bila mana perintah itu dibuat' ('the total amount due to the chargee at the date on which the order is made'). Perkataan-

perkataan ini diambil dari s 257(1)(c) Kanun Tanah Negara 1965 dan adalah mandatori. A

(3) Istilah 'sekat-tebus' digunakan untuk bermaksud langkah-langkah yang diambil untuk jualan harta yang digadai-janji melalui suatu perintah mahkamah atau melalui suatu kuasa jualan yang terkandung di dalam gadai-janji itu supaya hasil jualan boleh digunakan untuk membayar hutang itu.] B

Cases referred to

1 *Malayan Banking Bhd v Dagang Bina Sdn Bhd* [1991] 3 CLJ 1739 (refd)
2 *Kong Ming Bank Bhd v Leong Ho Yuen* [1982] 2 MLJ 111 (refd) C
3 *Jacob v Oversea-Chinese Banking Corp, Ipoh* [1974] 2 MLJ 161 (refd)
4 *Perwira Habib Bank Malaysia v Lim Hong Tatt* [1989] 1 MLJ 263 (refd)
5 *United Malayan Banking Corp Bhd and another appeal v Pekeliling Triangle Sdn Bhd* [1991] 2 MLJ 559 (refd) D
6 *Bank of New South Wales v Brown* (1983) 151 CLR 514 (refd)
7 *Mary Michael v United Malayan Banking Corp Bhd* [1971] 1 MLJ 172 (refd)
8 *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd* [1993] 1 MLJ 283 (refd) E

Legislation referred to

National Land Code 1965 s 257(1)(c)

WH Leong (*Skrine & Co*) for the plaintiff.

Sulaiman Azmel (*Rahman Hashim, VT Ravindran & Partners*) for the defendant. F

Cur Adv Vult

Mahadev Shankar J: This is an application by Citibank NA ('Citibank') for an order that the defendant's land ('the said land') be sold by public auction. G

The defendant claims that Citibank has not complied with O 83 r 3 of the Rules of the High Court 1980 ('the RHC').

The said land was charged to Citibank on 4 April 1990 ('the said charge') as security for the repayment to Citibank of all moneys and liabilities owing to Citibank by the defendant and his brother, Ahmad bin Othman, who were jointly referred to in the said charge as 'the Customer'. H

Clause 2 of the annexure to the said charge reads in material particular as follows:

> The chargor will pay to the chargee on demand all moneys ... now or hereafter owing ... together with ... interest on all such debts ... at the rate of 1.25%pa above the bank's base lending rate or 8.25%pa, whichever is higher with daily rests as well after as before the date of any demand to the date of actual repayment. I

Clause 22 reads:

> The total amount recoverable under this charge shall not exceed the sum of RM224,000 only ... for principal with in addition thereto all interest accrued due. Provided that such limitation shall not in any way affect or prejudice any right of the chargee independently of this charge to recover the total sum owing on any such account or in manner aforesaid over and above such limit. For the purposes of ascertaining the total of the principal sum owing all accumulated and capitalized interest shall be deemed to be interest and not principal sum.

On 30 April 1992, Citibank's solicitors gave the defendant and Ahmad bin Othman written notice of default and required the repayment of RM239,659.22 outstanding as at 31 March 1992 together with interest on the sum of RM233,264.37 at the rate of 14%pa from 1 April 1992 till the date of final payment.

The letter was not complied with. On 27 May 1992, Citibank's solicitors served the defendant with the statutory notice in Form 16D of the National Land Code 1965 ('the NLC').

This originating summons was filed on 22 July 1992. The affidavit-in-support deposed to by Citibank's assistant manager on 16 July 1992 is referred to hereafter as 'the first affidavit'.

A close reference to O 83 of the RHC will be useful if the issues here are to be clearly understood.

Where O 83 r 3(3) applies, the affidavit must show the state of the account between the chargor and chargee with particulars of the amount of the advance, the repayments, the interest in arrears at the date of the issue of the originating summons and at the date of the affidavit and the amount remaining due under the charge. This rule applies where the plaintiff claims delivery of possession. The particulars (aforesaid) are hereafter referred to as 'the statutory particulars'.

Order 83 r 3(6) provides that where the plaintiff claims payment of moneys secured by the charge, the affidavit must prove that the money is due and payable and give the particulars mentioned in O 83 r 3(3). And by para (7) if interest is claimed on the judgment, the affidavit must state the amount of a day's interest.

From O 83 r 3(1), it would appear that 'the affidavit' referred to in the sub-rules to O 83 r 3 is the affidavit-in-support of the originating summons.

The first affidavit of Citibank did not state:

(a) the correct amount of the advance;
(b) the amount of the repayment;
(c) the interest in arrears at the date of the issue of the originating summons (ie 22 July 1992) or the date of the first affidavit (ie 16 July 1992).

For the first hearing fixed on 20 January 1993, Citibank's assistant manager filed a second affidavit dated 15 December 1992 (encl 5). In this, he stated that the amount of the advance was RM233,264.37, that interest accruing due up to 20 January 1993 was RM23,451.63 and the total debt on that day was RM256,716 with interest at 14%pa. Daily interest was said to be RM89.47 till capitalization on 31 December 1993.

In response, the defendant filed an affidavit in which he challenged the amount claimed and the manner in which interest was varied and/or calculated. The case was adjourned to 23 April 1993 for disposal. On 15 February 1993, Citibank filed another affidavit (the third affidavit joining issue.) In this was exhibited a letter giving notice to the defendant of the variation of the interest rate to 2.25% above the base lending rate ('BLR') or 9.75%.

On 20 April, Citibank filed a fourth affidavit in which its assistant manager averred as follows:

> 3 Saya mengesahkan bahawa Ahmad Bin Othman ('peminjam itu') akan terhutang kepada plaintif setakat 23 April 1993 seperti berikut:
>
> | | |
> |---|---|
> | Amaun pendahuluan: | RM233,264.37 |
> | Tolak amaun pembayaran-pembayaran semula: | RM11,270.00 |
> | Campur: | |
> | Amaun bunga yang tertunggak setakat 22 Julai 1992 (iaitu tarikh saman pemula itu dikeluarkan) | RM7,207.47 |
> | Amaun bunga yang tertunggak setakat 19 April 1993 (iaitu tarikh pemfailan afidavit ini — dari 23 Julai 1992 hingga 19 April 1993) | RM24,207.10 |
> | Amaun bunga yang tertunggak setakat 23 April 1993 (iaitu tarikh pendengaran saman pemula itu — dari 20 April 1993 hingga 23 April 1993) | RM357.88 |
> | Kos guaman | RM500.00 |
> | Amaun yang belum dibayar di bawah gadaian itu setakat 23 April 1993 | RM265,536.82 |
>
> Selepas itu, pada 24 April 1993 bunga pada kadar 14% setahun akan terakru atasnya sehingga tarikh penyelesaian penuh. Kadar bunga harian pada masa kini adalah sebanyak RM89.47 sehingga bunga dipermodalkan pada 31 Disember 1993.

Citibank's counsel submitted ex improviso that since this was a foreclosure action, O 83 r 3(3) did not apply. He said that O 83 r 1 drew a distinction between an action claiming relief for: (a) payment of moneys secured by a charge; (b) sale of charged property; (c) foreclosure; and (d) delivery of possession to the chargee. He submitted that O 83 r 3(3) only applies to a situation where the plaintiff claims delivery of possession, and O 83 r 3(6) only applies to a situation where a plaintiff is claiming payment of moneys secured by a charge.

Encik Sulaiman Azmel of counsel for the defendant submits that this point has been settled by Abdul Razak J in *Malayan Banking Bhd v Dagang Bina Sdn Bhd.*[1] I agree but it seems to me pertinent to add that the true meaning of 'foreclosure' is a process whereby the mortgaged land 'becomes absolutely his, ie the mortgagee's' (See *Stroud's Judicial Dictionary* (5th Ed) at p 1010.) Subject to correction, the word 'foreclosure' does not seem to appear anywhere in Part Sixteen of the NLC. Charged land in Selangor can only become the property of a chargee if he successfully bids for it in a sale ordered by the court. In a loose sense therefore, the term foreclosure is being used to mean the steps taken for the sale of the mortgaged property

by a court order or by a power of sale contained in the mortgage so that the sale proceeds can be used to pay off the debt. Citibank here applied for an order of sale in order to effect payment of moneys secured by the charge. Reading O 83 rr 1(1)(a), (b), (c), 3(3) and 3(6) together, I think it was incumbent on the plaintiff to provide the statutory particulars in the first affidavit.

In the present case, the statutory particulars were purportedly provided in the fourth affidavit. But instead of explicitly stating that the money was owed by the defendant and Ahmad bin Othman, as had been done in every preceding affidavit, this one stated the money was owing by Ahmad bin Othman. This error did not prejudice the defendant since he and his brother were jointly liable for all moneys advanced to either or both of them.

The purported statutory particulars were challenged by the defendant. Citibank claims that the amount of the advances as at 23 April 1993 was RM233,264.37. The defendant contended that the principal sum advanced was only RM224,000. Citibank claimed the right to accumulate interest with daily rests and capitalize the same. When Citibank recalled the facility, it was charging interest at 14%pa.

By cl 5 of the agreement, Citibank was entitled to vary the rate of interest from time to time by serving the defendant with a notice of its intention to do so. At the time of the execution of the charge, Citibank's BLR was 7.5%. The interest charged was 8.75%pa. On 15 October 1990, notice was given of the intention to increase to 2.25% above BLR or 9.75%. No evidence has been adduced by Citibank to show when the interest was hiked up to 14% as from 1 April 1992 till realisation.

Citibank claimed that it was entitled to recover the capital sum lent, ie RM224,000 and also recover all accumulated interest in addition thereto. The defendant claimed that Citibank was not entitled to recover more than RM224,000 from him in any event.

The said charge contains an indorsement that the facility agreement and the said charge are instruments employed in one transaction to secure the sum of RM224,000 and interest thereon. Clause 2 of the agreement imposed a liability on the defendant to pay all monies owing by him and Ahmad bin Othman together with interest at the rate of 1.25%pa above the bank's BLR or 8.25%pa, whichever is higher with daily rests as well after as before the date of any demand to the date of actual repayment. Clause 22 provides that the total amount recoverable under this charge shall not exceed RM224,000 only for principal with in addition thereto all interest accrued due. For the purposes of ascertaining the total of the principal sum owing, all accumulated and capitalized interest was to be deemed to be interest and not principal sum. The clause included a proviso giving Citibank a right to recover the total sum owing over and above the limit, independently of the charge and without regard to the limitation.

Four authorities were cited by Citibank's counsel to support his contention that the limit of RM224,000 in cl 22 applied to principal only, and that therefore Citibank was entitled to recover this amount and any further amount which had accrued thereon by way of interest even though by doing so the total amount exceeded RM224,000. These authorities are:

(a) *Kong Ming Bank Bhd v Leong Ho Yuen*; [2]
(b) *Jacob v Oversea-Chinese Banking Corp, Ipoh*;[3]
(c) *Perwira Habib Bank Malaysia v Lim Hong Tatt*;[4] and
(d) *Commentary on the National Land Code* (2nd Ed) by Judith Sihombing at pp 575 and 576.

The defendant's counsel placed great emphasis upon the words 'the total *amount recoverable* shall not exceed RM224,000', but the sentence does not end there and the words which immediately follow are, 'for principal *with in addition* thereto all interest accrued due'. (Emphasis added.) In my view, there is no ambiguity here. The aggregate recoverable was RM224,000 *plus* the interest due.

In *United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd*,[5] the Supreme Court held (after referring with approval to *Bank of New South Wales v Brown*[6] that interest is interest, however the amount is computed or calculated. At p 563 col 2G, Gunn Chit Tuan SCJ (as he then was) said, ' ... We are therefore of the view that capitalized interest and compound interest mean the same thing.'

In the light of these authorities, it is clear that the figure of RM233,264.37 stated as 'the amount of the advances' is wrong. I hold that this expression must mean the principal or capital sum advanced. Both parties now agree it is RM224,000.

The remaining statutory particulars supplied do not show how the interest was really calculated or how Citibank became entitled to charge 14%pa and from what date.

This is where the real difficulty is. In *Mary Michael v United Malayan Banking Corp Bhd*,[7] there was a dispute as to the amount of the interest chargeable. The chargor contended that the bank was not entitled to charge increased interest and asked for an account to be taken to ascertain the present amount due. The bank's counsel conceded that only simple interest should be charged after the account was closed and did not object to the taking of accounts.

So the court ordered accounts to be taken on this basis to ascertain the correct amount due. In the present case, Mr Leong was unable to say when the bank interest had been varied from 8.75% at inception to 14%pa on 1 April 1992; he submitted that the court should make an order for payment of interest at 8.25%pa and that the senior assistant registrar should be ordered to take accounts on this basis in order to determine what the amount due to the plaintiff should be. He said he could provide the calculations and leave the defendant to challenge the same.

With respect, *Mary Michael*'s case[7] was decided long before the RHC came into force. The objective of the present legislation is to enable the chargee to know at least by the date the originating summons is filed, what is the exact sum he is legally liable to pay. What has to be shown is the state of the account with the statutory particulars. If there is a dispute as to the amount payable, the court must be able to say precisely when making its order 'the total amount due to the chargee at the date on which the order is made'. These words are from s 257(1)(c) of the NLC and they are mandatory.

A It is a well-established rule of construction that unless the context specifically so excludes, words in the singular must include the plural. It is to be noted that O 83 r 3(3) gives the court the power to dispense with the statutory particulars 'in any case or class'. More than one affidavit can and is usually filed in this type of case because invariably the matter cannot be B disposed of on the first return date (eg for non-service) and at least one further afidavit is always required to state the total amount due on the date of the order. Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

C Defence counsel submitted on the authority of *Asia Commercial Finance (M) Bhd v Kimden Housing Development Sdn Bhd*[8] at p 359, that if all the required statutory particulars are not contained in the very first affidavit filed in support of the originating summons, there is a 'fundamental breach' which is incurable and the entire proceedings are thereby rendered nugatory.

D The concept of 'fundamental breach' is one peculiar to non-performance of obligations which go to the root of a contract, and I am not sure how appropriate it is in the present context. With respect to defence counsel, I do not think that this case supports the proposition he advanced.

The real basis of that decision was that there was a total failure to serve E the defendant with notice of appointment for the adjourned hearing. There was thus a deprivation of the right of being heard. The proceedings were therefore a nullity (see passages at p 363). In this respect, the law appears to give the defendant a second chance to put in an appearance.

As much as the verb 'must' appears in O 83 r (3)(a), so does the verb 'shall' appear in O 2 r 1 whereby the failure to comply with any of the RHC F shall not nullify the proceedings. So one must ask oneself what the objective of O 83 r 3(3) was. It is to tell the defendant how much precisely is being claimed so that he can make up his mind to contest or pay up.

If he has any valid defences he must take them. It is in the public interest that there should be an end to litigation. I do not think it right where the G final order states what is correctly due that a defendant, who has been duly served with proceedings and elects not to take defences open to him when he ought to do so, should be allowed to come long after the order has been perfected, the period of appal has lapsed and perhaps even after the sale has been concluded to say that because there was earlier omission to recite some of the statutory particulars the entire order should be set aside. What H applies to the defendant must equally apply to his successor-in-title.

What the chargor has lost where there is a failure to comply with O 83 r 3(3) is the opportunity to satisfy himself of the correctness of the amount claimed, and to challenge the figures if he is not. A bare denial of a debt was never enough. The chargor also has an onus if he denies the amount I claimed to say how much he admits owing. In this kind of case, the dismissal of the application for non-compliance with some aspect of the rules does not extinguish the debt. The chargee can start afresh but there will then be additional costs, interest and delay.

This is the very situation which O 2 r 1(2) of the RHC was meant to cater for. The question is whether the failure to comply with the rules can be cured by setting aside the proceedings in whole or in part or by allowing some amendment to be made, all of which must be on such terms as to costs or otherwise as the court thinks just.

Citibank however, has only itself to blame for the morass in which it finds itself. By the time it filed its third affidavit, it was aware of the challenges being made. The fourth and last affidavits filed before the final hearing did not remedy the earlier inadequacies. It did not correctly state the amount of the advance. It did not show at what rate the interest had been calculated. This was a material omission because the chargor had expressly disputed liability to pay 14%pa. The fourth affidavit consequently did not prove that the money claimed was due and payable.

The lesson for all concerned is that they must get the first affidavit right or face the consequences in terms of costs or even a dismissal of the proceedings if the situation has not been put right by the time the order is made.

I now order that these proceedings be dismissed, that the costs be taxed, and Citibank be liable therefore to the defendant who shall be entitled to claim a set-off for the same against his debt to Citibank.

Proceedings dismissed.

Reported by Siti Zulaiha Abdullah